

Parole board told to explain why repeat sex offender was released from jail

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A R2m damages claim by a woman who was attacked by a "high risk" repeat sex offender while he was out on parole, has been revived by a recent ruling of the Supreme Court of Appeal.



Illustration: Lisa Nelson

- A woman who was attacked by a repeat sex offender who was out on parole is suing the minister of justice for R2 million in damages.
- The High Court previously ruled that there was no evidence the parole board's decision had been "tainted or flawed".
- Now the Supreme Court of Appeal has disagreed and said "there is certainly a case to answer".

The appeal court has ruled that the Minister of Justice and Correctional Services and the parole board must account for the decision to release Ivan Botha on parole. Botha had been convicted of three sexual offences dating back to 1996.

The appeal court overturned a previous ruling by the Pretoria High Court when Judge Moses Mavundla, presiding over the civil damages claim for pain and suffering, absolved the minister.

Mavundla ruled there was not enough evidence to put the minister, or officials from the department of correctional services and the parole board, on terms to explain why Botha had been released.

The judge ruled that any decision by the parole board was a value judgment and there was no evidence that its decision to release Botha, in November 2010, was “tainted or flawed”.

But in a unanimous judgment, penned by Acting Judge David Unterhalter, the SCA has now said this was wrong.

“The superficial commentary offered in the social workers report, the vagueness of what was said by the case management committee and the lack of a psychologist’s report make out a case on the basis of which it could be said that the board decided to release him [Botha] when there was significant risk attached to their decision,” said Unterhalter.

On top of this there was evidence that Botha had broken certain conditions of his parole and had only been given verbal warnings.

Evidence in the trial court was that Botha had attacked the woman in Oudtshoorn in April 2012 and had attempted to assault, rape and rob her.

He was later convicted of these crimes and sent back to jail.

The woman instituted a civil claim, alleging the minister had not discharged his duty to protect her and that given his criminal record, Botha should not have been released.

While he had broken his parole conditions, he had been “left at large” to attack her and, possibly other members of the public.

She relied in her case on a constitutional duty of the minister to protect the public and to protect women from violent crimes.

She claimed that the parole board had breached its statutory duty by not adequately regulating the release of inmates.

Turning to the “common cause” facts, and the parole board documents which were submitted during the trial, Unterhalter said there were indications that Botha was a suitable applicant for parole: his conduct inside prison had been good; he had completed a number of rehabilitation programmes; he was reported to have shown remorse; his family was supportive of him, and he had a home to go to.

But missing was a psychologist’s report, which the board had previously insisted on when it turned down his earlier bid for parole in 2007.

The judge noted that in September 2009 the case management committee had recommended that a further profile report be submitted and that Botha should attend more programmes in prison.

“These are matters of some importance,” the judge said.

“How the parole board came to its decision in the face of these requires some explanation.

“He was a repeat sexual offender.

“On the documentary evidence produced at the trial there is a case to be made that the parole board should have flagged

the risks of releasing a prisoner on parole with an apparent propensity to commit acts of sexual violence.

“There is certainly a case to answer as to why the parole board considered that it should proceed to release him, without the benefit of a psychologist’s report.”

Unterhalter said that while parole decisions involved “calculated risks”, if it exercised its power without due regard to these risks, its conduct could be judged wrongful and negligent.

“A court might find it acted wrongly and negligently in releasing him.

“Until such time as those who made the parole decisions come to give evidence about what they did, there is sufficient evidence that could permit a finding that the board acted wrongly and negligently.

“The high court found there was no discernable error in the exercise of its discretion. That finding cannot stand ... there was reason for it to proceed with caution.”

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